Supreme Court, U.S.
FILED
APR 14 2003
CLERK

No. 02-1335

In the Supreme Court of the United States

JEFFERSON SMURFIT CORPORATION (U.S.),

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Russell E. Prins
Glenn R. White
Assistant Attorneys General
Attorneys for Respondent

28 pp

QUESTION PRESENTED

DOES THE FORMER CAPITAL ACQUISITION DEDUCTION PROVISION OF THE MICHIGAN SINGLE BUSINESS TAX ACT, REPEALSED IN 1999, VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES?

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

A. The Commerce Clause Prohibits Discrimination Against Interstate Commerce But Does Not Prohibit States from Offering Facially Neutral Investment Incentives. 8

1. Section 23(e) Does Not Facially Discriminate Against Interstate Commerce. 10

2. Section 23(e) Did Not Have a Discriminatory Effect on Interstate Commerce. 14

3. Section 23(e) Did Not Have a Discriminatory Purpose 15

B. This Case is Distinguishable from *Westinghouse v. Tully*. That was a Case Involving Facial Discrimination. 17

C. The Issues Raised By Petitioner Are No Longer Viable... 21

CONCLUSION 21

INDEX OF AUTHORITIES

Cases

Allied Stores of Ohio v. Bowers,
358 U.S. 522; 79 S. Ct. 437; 3 L. Ed. 2d 480 (1959)..... 12
American Trucking Assns, Inc. v. Scheiner, 483 U.S 266; 107 S. Ct. 2829; 97 L. Ed. 2d 226 (1987)..... 13
Armco Inc v. Hardesty,
467 U.S. 638; 104 S. Ct. 2620; 81 L. Ed. 2d 540 (1984)... 11, 13, 16
Ashland Oil v. Caryl,
497 U.S. 916; 110 S. Ct. 3202; 111 L. Ed. 2d 734 (1990).. 13
Boston Stock Exchange v. State Tax Comm, 429 U.S. 318; 97 S. Ct. 599; 50 L. Ed. 2d 514 (1977)..... 10
Caterpillar v. Michigan Department of Treasury,
440 Mich. 400; 488 N.W. 2d 182; *cert den*, 506 U.S 1014; 113 S.Ct. 636; 121 L. Ed. 2d 567 (1992)..... passim
Complete Audit Transit, Inc. v. Brady,
430 U.S. 274, 279; 97 S. Ct. 1076; 51 L. Ed. 2d 326 (1977) 7
Goldberg v. Sweet,
488 U.S. 252; 109 S. Ct. 582; 102 L. Ed 607 (1989)..... 8, 12
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973)..... 7
Maryland v. Louisiana,
451 U.S. 725; 101 S. Ct. 2114; 68 L. Ed. 576 (1981)..... 11
Moorman Manufacturing v. Bair,
437 U.S. 267; 98 S.Ct. 2340; 57 L. Ed. 2d 197 (1978)..... 12
New Energy Co. v. Limbach,
486 U.S. 269; 108 S. Ct .1803; 100 L. Ed. 2d 302 (1988)..... 8, 11
Reynolds Metals Co. v. Sizemore Comm'r of Alabama,
588 So. 2d 373; cert den 496 U.S. 912; 110 S. Ct. 2602; 110 L. Ed. 2d 282 (1990)..... 12

Trinova v Michigan Department of Treasury, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991) ..... passim
Tyler Pipe Industries, Inc. v. Washington State Dept of Revenue, 483 U.S. 232; 107 S. Ct. 2810; 97 L. Ed. 2d 199 (1987) 11
Westinghouse Electric Corp v. Tully, 466 U.S. 388; 104 S. Ct. 1856; 80 L. Ed. 2d 388 (1984) ..... passim
Wisconsin v. J. C. Penney Co., 311 U.S. 435; 61 S. Ct. 246; 85 L. Ed. 267 (1940) 8

Statutes

1975 P.A. 228 ..... 3, 6
1991 P.A. 77, § 1 4
1991 P.A. 77, § 2 4
1995 P.A. 282 4
1995 P.A. 283 4
1999 P.A. 115 ..... 3, 6
MCL 208.23(e) 2
MCL 208.23b 16
MCL 208.31(2) 16
MCL 208.31(4) 16
MCL 208.35 16
MCL 208.46 3
MCL 208.49 3
MCL 208.51 4
MCL 208.77 16

Other Authorities

Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business", 110 Harv. L. Rev. 377 (1996) 17

Hellerstein and Coenen, "Commerce Clause Restraints on State Business Development Incentives", 81 Cornell L Rev 789 (1996) 17

Hellerstein, State Taxation and the Supreme Court, 1983-84 Term; 3 NYU Inst on State and Local Taxation, Ch 13 (1985) 17

Kenyon, Reassessing Competition Among State and Local Governments, 16 Intergovernmental Perspective 32 (Winter 1990) 18

Pschak, State Economic Development Incentives: What's Available? What works? 8 J of State Taxation 191 (1990) 18

Seogo & Schell, Tax Credits and the Commerce Clause After Westinghouse Electric Corporation, 3 J of State Taxation 101 (1984) 17

OPINIONS AND ORDERS BELOW

The opinion of the Michigan Court of Appeals is reported at 248 Mich. App. 271; 639 N.W. 2d 269 (2001). Petitioner's App. 1-10. The order denying Petitioner's motion for rehearing was issued on January 11, 2002. The Michigan Supreme Court's denial of Petitioner's Application for Leave to Appeal is reported at 467 Mich. 919; 656 N.W. 2d 519 (2002). The Michigan Court of Claims' amended judgment granting summary judgment to Petitioner was issued on December 13, 1999. Pet. App. 26a.

STATEMENT OF THE CASE

In *Trinova v Michigan Department of Treasury*, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991), this Court considered and rejected a constitutional challenge to the use of the three-factor apportionment formula with Michigan's value-added tax base. In *Trinova* the Court described the computation of the value-added tax base as follows, 498 U.S. at 367-368:

> The Michigan SBT is an addition method VAT, although it inevitably permits various exclusions, exemptions, and adjustments that depart from the simple value added examples described above. Subject to exemptions contained at Mich Comp Laws § 208.35, Michigan SBT is levied against any person with "business activity" within the State of Michigan. Mich Comp Laws § 208.31(1) (1979). In order to calculate the amount of a taxpayer's SBT the taxpayer must, first, determine its total tax base. The total tax base consists of the taxpayer's value added, calculated by the addition method: Cost of Labor + Depreciation + Interest + Profit. Under Mich Comp Laws § 208.9 (1979), the

> taxpayer begins with federal taxable income (representing profit), adds other elements that reflect consumption of labor and capital including compensation, depreciation, dividends, and interest paid by the taxpayer, and makes other detailed adjustments.
>
> Second, if a taxpayer does business both within and without Michigan, it must determine the portion of its total value added attributable to Michigan. That portion, the crux of this case, is the average of three ratios: (1) Michigan payroll to total payroll, (2) Michigan property to total property, and (3) Michigan sales to total sales. Mich Comp Laws §§ 208.45, 208.46, 208.49, 208.51 (1979). The total tax base is multiplied by the portion of business activity attributable to Michigan activity (under the three-factor formula), and the result, subject to several further adjustments, is the taxpayer's "adjusted tax base." § 208.31(2).
>
> Two further adjustments are relevant here: § 208.23(a), which permits a taxpayer to deduct a portion of its capital acquisitions, and § 208.31(5), which permits a labor-intensive taxpayer to reduce its adjusted tax based by a percentage equal to the percentage by which compensation exceeds 63% of the total tax base, but with such reduction not to exceed a maximum of 37%. Actual tax liability equals the adjusted tax base multiplied by a tax rate of 2.35%. [Emphasis added].

This case involves a constitutional challenge to the manner in which the capital acquisition deduction (CAD) was calculated for depreciable property [MCL 208.23(e)] prior to

the repeal of the CAD provision by 1999 Public Act 115 on July 15, 1999.

The single business tax as originally enacted in 1975, and as in effect when this Court decided *Trinova*, contained a site-specific capital acquisition deduction. 1975 P.A. 228, § 23. The CAD for real property was limited to property located in Michigan. 1975 P.A. 228, § 23(c). There was also a CAD for tangible personal property that was apportioned by multiplying the cost of all tangible personal property acquired during the year "by a fraction, the numerator of which is the payroll factor[1] plus the property factor[2] and the denominator of which is 2." 1975 P.A. 228, § 23(a). Intrastate businesses received a CAD based on all of their qualified acquisitions, interstate businesses received a CAD for all of their qualified real property located in Michigan and for the apportioned cost of qualified personal property located within and without Michigan.

Both aspects of the CAD were challenged in *Caterpillar v. Michigan Department of Treasury*, 440 Mich. 400; 488 N.W. 2d 182; *cert den*, 506 U.S 1014; 113 S.Ct. 636; 121 L. Ed. 2d 567 (1992). Plaintiff claimed that § 23(a) was unconstitutional because the apportionment formula for the CAD was composed of two factors, payroll and property, while under § 45 its tax base was apportioned by a three factor formula consisting of a fraction, "the numerator of which is the

---

[1] "The payroll factor is a fraction, the numerator of which is the total wages paid in this state…the denominator of which is the total wages paid everywhere…." MCL 208.49.

[2] "The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented in this state during the tax year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented during the tax year." MCL 208.46.

property factor plus the payroll factor plus the sales factor,[3] and the denominator of which is 3." It also contended it was unconstitutional to limit the CAD for real property to that property located in Michigan. 440 Mich. at 404-405. Caterpillar was successful in the trial court, which ruled that the CAD discriminated against interstate commerce and was therefore unconstitutional. 440 Mich. 405-406. The Michigan Court of Appeals did not address the constitutional question. 440 Mich. 407. When granting leave to appeal the Michigan Supreme Court asked the parties to brief whether the CAD did indeed violate the Constitution's Commerce Clause. 440 Mich at 408.

While appeal to the Michigan Supreme Court was pending, the Michigan Legislature amended the Act. *See* 1991 P.A. 77, § 2. The CAD was altered by allowing a deduction for the apportioned cost of both real and depreciable personal property located within and without Michigan, using the same apportionment formula that is used to apportion a taxpayer's tax base. 1991 P.A. 77, § 1.

The Michigan Supreme Court ultimately ruled that neither component of the original CAD violated the Commerce Clause. 440 Mich. at 429.

Amendments to the Single Business Tax Act in 1995 included changes to the CAD and the formula used for apportioning both the SBT tax base and CAD. 1995 P.A. 282, 1995 P.A. 283.[4] As amended, § 23 provided for a site-specific

---

[3] "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer's everywhere during the tax year." MCL 208.51.

[4] Tie-barred to the CAD amendment (1995 P.A. 282), was an amendment (1995 P.A. 283) that changed the apportionment formula used by multistate taxpayers to apportion their SBT tax base. 1995 P.A. 283, § 1. As amended, section 45(5) provides:

CAD, i.e., a deduction limited to depreciable real and personal property located in Michigan. Section 23(e) reads:

> Sec. 23. After allocation as provided in section 40 or apportionment as provided in section 41, the tax base shall be adjusted by the following:
>
> ***
>
> (e) Except as provided in subdivisions (g),(h), and (i), for a tax year beginning after December 31, 1996, deduct the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes, provided that the assets are physically located in this state for use in a business activity in this state and are not mobile tangible assets. This deduction shall be multiplied by the apportionment factor for the

---

(5) Except as provided in subsections (4) and (7) and for tax years beginning after December 31, 1996 and before January 1, 1999, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 10%.
(b) The payroll factor multiplied by 10%.
(c) The sales factor multiplied by 80%.

> tax year as prescribed in chapter 3 [MCL 208.45].

The Michigan Legislature, aware of *Caterpillar's* constitutional challenge to the prior site-specific CAD (1975 P.A. 228), and the potential for a challenge to the newly amended CAD prudently provided an alternative scheme. MCL 208.23a.

Petitioner attempts to impugn this legislation by offering the legal opinions of its "expert witness" and others. See Petition at 15-16.

Not only does the mere questioning of a statutory provision not render the provision illegal, but more importantly, the opinion of *some* experts or even *a* dissenting legislator[5] does not trump the opinion of the Legislature, or of a Court.

The Michigan Legislature repealed the CAD in 1999. Effective for tax years beginning January 1, 2000, both the site-specific and fall-back capital acquisitions deduction provisions expire. MCL 208.23 as amended by 1999 P.A. 115. The legislation also phases out the single business tax, by reducing the tax rate of 2.3% by .1% per year, potentially[6] ending the tax in 23 years. 1999 P.A. 115, § 3. A subsequent amendment accelerates the repeal of the single business tax

---

[5] On page 6 Petitioner claims that Senator Peters's protest against SB 342 that contained the site-based deduction as unconstitutional "proves" its case. Petitioner ignores the fact that on a vote of 28 to 7 the Senate approved enactment of SB 342, rejecting Senator Peters's constitutional challenge to the bill by a four-to-one margin. 1995 Journal of the Senate, 2385-86 (December 13, 1995).

[6] The annual .1% reduction in tax rate is predicated on a budget and economic stabilization fund balance of more than $250,000,000. MCL 208.31(5). The current tax rate is 1.9%.

effective for tax years that begin after December 31, 2009. 2002 Public Act 531.

This is the second constitutional challenge to a site-based method for calculating the CAD. As noted above, Caterpillar Corporation alleged that limiting the CAD to property located in Michigan was unconstitutional. The Michigan Supreme Court applied this Court's four-pronged test contained in *Complete Audit Transit, Inc. v. Brady*, 430 U.S. 274, 279; 97 S. Ct. 1076; 51 L. Ed. 2d 326 (1977), and concluded that the former CAD provisions did not violate the Commerce Clause of the U.S. Constitution. This Court denied *Caterpillar's* petition for writ of certiorari on November 30, 1992. *Caterpillar v Michigan Department of Treasury*, *supra*, 440 Mich. 400; *cert. den.* 506 U.S. 1014 (1992).

REASONS FOR DENYING THE WRIT

The provisions of Michigan's single business tax pertaining to the capital acquisition deduction which Petitioner challenged were repealed in 1999 so the challenge is no longer viable. Moreover, the entire single business tax act is repealed effective for tax years that begin after December 31, 2009. Even if Petitioner's claim retains some vitality, it is clear that the case does not involve any important undecided question of federal law, and it is clear that the Michigan Court of Appeals has not decided any federal question in a way that conflicts with the decision of another state court of last resort, of a United States Court of Appeals, or of this Court. Supreme Court Rule 10(a)(b).

A statute is presumed constitutional absent a clear showing to the contrary. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973). In the realm of state taxation, state legislatures have great discretionary latitude in formulating taxes. *Wisconsin v.*

J. C. Penney Co., 311 U.S. 435, 444-445; 61 S. Ct. 246; 85 L. Ed. 267 (1940).

One of the constitutional restrictions upon the taxing power of the states is the Commerce Clause of the U.S. Constitution (art I, §. 8, cl 3). The "negative" aspect of the Commerce Clause

> ... prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. (citations omitted). Thus state statutes that clearly discriminate against interstate commerce are routinely struck down, (citation omitted). [*New Energy Co. v. Limbach*, 486 U.S. 269, 273-274; 108 S. Ct. 1803; 100 L. Ed. 2d 302 (1988)].

The crucial distinction is whether the state tax scheme, by design or result, protects local business at the expense of out-of-state competitors and discriminates in favor of in-state economic interests at the expense of out-of-state competitors. *Goldberg v. Sweet*, 488 U.S. 252, 266; 109 S. Ct. 582; 102 L. Ed 607 (1989). The former CAD provisions did not, by design or result, protect local business at the expense of out-of-state competitors.

A. The Commerce Clause Prohibits Discrimination Against Interstate Commerce But Does Not Prohibit States from Offering Facially Neutral Investment Incentives.

This Court has interpreted the Commerce Clause of the U.S. Constitution (Art 1, § 8, cl 3) as directly limiting the power of states to discriminate against interstate commerce. In *New Energy Co. v. Limbach*, *supra,* 486 U.S. at 273-274, the

Court described this "negative" aspect of the Commerce Clause:

> It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. This "negative" aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus State statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. [Citations omitted.]

In *Trinova v Michigan Department of Treasury*, *supra*, 498 U.S. 358, this Court rejected the taxpayer's Commerce Clause challenge to the Single Business Tax Act (SBTA) because "Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face, as in the cases it cites." 498 U.S. at 384. In regard to the taxpayer's criticism that "the SBT was enacted 'to promote the development and investment of business within Michigan'," 498 U.S. at 385, Justice Kennedy, writing for the majority, commented, 498 U.S. at 385-386:

> This statement helps Trinova not at all. It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state. States are free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry. *Boston Stock*

Exchange, supra, [429 U.S.] at 336, [50 L. Ed. 2d 514; 97 S. Ct. 599 (1977).]

1. Section 23(e) Does Not Facially Discriminate Against Interstate Commerce.

In the last 25 years the Court has focused its attention on claims that a state tax discriminates against interstate commerce. Beginning with *Boston Stock Exchange v. State Tax Comm*, 429 U.S. 318; 97 S. Ct. 599; 50 L. Ed. 2d 514 (1977), the U.S. Supreme Court has invalidated state tax schemes that favor local businesses over interstate businesses.

In *Boston Stock Exchange*, the U.S. Supreme Court struck down a New York stock transfer tax which provided for reduced rates for certain transfers of stock that were sold through the New York stock exchange. The Court explained:

> The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than compensating New York for a supposed competitive disadvantage resulting from [the former statute], the amendment [providing the tax break] forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to her sister States. *Id.* [429 US at 331.]

The Court concluded that:

> No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct

> commercial advantage to local business." [429 US 318, 329.]

In *Maryland v. Louisiana*, 451 U.S. 725; 101 S. Ct. 2114; 68 L. Ed. 576 (1981), the Court held unconstitutional Louisiana's first-use tax on natural gas because it "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." 451 U.S. at 756. Similarly, in *Bacchus Imports Ltd v. Dias*, 468 US 263; 104 S. Ct. 3049; 82 L. Ed. 2d 200 (1984), the Court nullified an exemption for locally produced alcoholic beverages in Hawaii's excise tax on the wholesale sale of liquors. The obvious intent of the exemption was to aid the Hawaiian liquor industry. 468 U.S. at 271.

In *Westinghouse Electric Corp v. Tully*, 466 U.S. 388; 104 S. Ct. 1856; 80 L. Ed. 2d 388 (1984), the Court invalidated the New York franchise tax credit for export sales shipped from a regular place of business of the taxpayer within New York. 466 U.S. at 393. And in *Armco Inc v. Hardesty*, 467 U.S. 638; 104 S. Ct. 2620; 81 L. Ed. 2d 540 (1984), the Court struck down a West Virginia tax scheme in which a tax exemption from the state's wholesale tax was granted only to local manufacturers. Likewise, in *Tyler Pipe Industries, Inc. v. Washington State Dept of Revenue*, 483 U.S. 232; 107 S. Ct. 2810; 97 L. Ed. 2d 199 (1987), a manufacturing tax exemption for local businesses which also engaged in wholesaling within the state was held unconstitutional because it protected local manufacturing businesses.

In *New Energy Co. v. Limbach, supra*, the Court concluded that the Ohio tax credit under the motor vehicle fuel sales tax for ethanol produced in Ohio, or in a state that grants similar tax advantages to ethanol produced in Ohio, was facially discriminatory and unconstitutional. The Court

explained that the Commerce Clause "prohibits economic protectionism." 486 U.S. at 273.

In two more recent decisions, *Trinova, supra*, and *Goldberg v. Sweet*, 488 U.S. 252; 109 S. Ct. 582; 102 L. Ed. 2d 607 (1989) the Court upheld the state taxes against claims of discrimination against interstate commerce. And the Court did not disturb the Michigan Supreme Court's decision in *Caterpillar, supra,* 506 U.S. 1014 (1992).

In contrast to what states cannot do under the Commerce Clause, the Court has also indicated what permissible action states may take in state taxation. First of all a state may discriminate in favor of interstate commerce and against local businesses. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522; 79 S. Ct. 437; 3 L. Ed. 2d 480 (1959). States can impose two different taxes, one or more on domestic businesses and one or more upon interstate businesses that impose an approximately equal tax burden. *Reynolds Metals Co. v. Sizemore Comm'r of Alabama*, 588 So. 2d 373; cert den 496 U.S. 912; 110 S. Ct. 2602; 110 L. Ed. 2d 282 (1990).

A state can legitimately protect domestic manufacturing businesses by using a one-factor sales formula to apportion the tax base subject to tax. *Moorman Manufacturing v. Bair*, 437 U.S. 267; 98 S.Ct. 2340; 57 L. Ed. 2d 197 (1978). It is also permissible for states to give direct cash subsidies to promote business activities within the state. *New Energy Co. v. Limbach, supra*, 486 U.S. at 278.

As indicated in the Court's analyses in *New Energy* and *Goldberg v. Sweet*, 488 U.S. 252; 109 S. Ct. 582; 102 L. Ed. 2d 607 (1989), the crucial distinction is whether the tax scheme, by design or result, protects local businesses at the expense of out-of-state competitors and discriminates in favor of in-state economic interests at the expense of out-of-state competitors.

488 U.S. at 266. Simply stated, Michigan's former CAD did not do so.

Michigan's former CAD did not protect local businesses at the expense of out-of-state competitors. It did not discriminate between local businesses and interstate commerce. The deduction was available for any business, interstate or domestic, which acquired depreciable property in Michigan during the tax year. If a domestic corporation did not invest in depreciable property in Michigan, it got no CAD. If a multistate corporation acquired property in Michigan, it was entitled to a CAD.

On its face the CAD did not discriminate between intrastate and interstate commerce. It did not violate the Commerce Clause prohibition against economic protectionism[7].

---

[7] Petitioner errs when claiming that the Michigan Court of Appeals erred because it did not discuss the "internal consistency test." Courts, including the Michigan Court of Appeals, are not required to respond to every argument raised by parties. Jefferson Smurfit's reliance on the so-called internal consistency test is misplaced. The internal consistency test has historically been used to test whether a state tax is fairly apportioned. *See Armco*, 467 U.S. at 648. It was given wider application in *Armco*, where West Virginia taxed out-of-state manufacturers who made wholesale sales in-state but exempted in-state manufacturers from the tax. *Id* at 640. Thus, it was a tax statute that on its face discriminated against out-of-state business. "At most, *Armco* may be read for the proposition that a tax that is facially discriminatory is unconstitutional if it is not internally consistent". *Ashland Oil v. Caryl*, 497 U.S. 916, 920; 110 S. Ct. 3202; 111 L. Ed. 2d 734 (1990) (Citing and quoting *American Trucking Assns, Inc. v. Scheiner*, 483 U.S 266, 303; 107 S. Ct. 2829; 97 L. Ed. 2d 226 (1987). (In her dissenting opinion in *American Trucking*, Justice O'Connor also stated "Nor do I read *Armco* as establishing a grandiose version of the "internal consistency test" as the constitutional measure of all taxes under the Commerce Clause." *Id.* The SBT taxes both in-state and out-of-state businesses and is not facially discriminatory.

2. Section 23(e) Did Not Have a Discriminatory Effect on Interstate Commerce.

The CAD did not discriminate against multistate businesses. Jefferson Smurfit argues that the CAD violated the Commerce Clause because it unconstitutionally encouraged investment in Michigan.[8] The CAD was only invalid if it discriminated against interstate commerce. Analysis of the effect of the CAD clearly shows that it did not discriminate against multistate businesses.

The Michigan Court of Appeals explained that:

> States may compete with one another for a share of interstate commerce, they just may not discriminatorily tax the products manufactured or the business operations performed in other states. *Boston Stock Exchange, supra* at 336-337. Here, the CAD is available to all Michigan taxpayers who locate new property in Michigan, whether intrastate or multistate businesses, and it is available at the same apportioned rate as is applied to the taxpayer's overall tax base. The three-factor apportionment formula of the Single Business Tax Act has survived constitutional challenge, see *Trinova, supra* at 387, and the availability of an apportioned CAD in a given tax year is not dependent on the initial location of the taxpayer's assets, but rather turns on the taxpayer's election to increase its Michigan investment.

---

[8] Jefferson Smurfit invested $151 million in depreciable assets in other jurisdictions versus $600 thousand in Michigan. What tax incentives offered in other states or nations encouraged such investment decisions is not at issue. Michigan's CAD obviously did not discourage such foreign investments.

We conclude, therefore, that the CAD provision is not designed to punish multistate taxpayers who choose not to increase their Michigan presence. Moreover, we are not convinced that the CAD provision is responsible for any deleterious effects suffered by multistate taxpayers who opt to increase activity outside Michigan. Accordingly, we note agreement with an analysis adopted by our Supreme Court in *Caterpillar, supra* at 425:

> "Generally speaking, the overall tax consequences to a multistate taxpayer will be dependent upon the nature of its business activities and whether it is eligible and elects to avail itself of the tax reduction incentives afforded by the [SBT]." [Pollack, *Multistate taxpayers under the Single Business Tax Act,* 22 Wayne L. R. 1101, 1113 (1976)]

We hold that the site-specific CAD available pursuant to subsection 23(e) has no discriminatory effect on interstate commerce. 248 Mich. App. 280-281.

3. Section 23(e) Did Not Have a Discriminatory Purpose

Business choices by taxpayers invariably have tax consequences. The fact that some multistate businesses have a higher effective tax rate in comparison to other multistate

taxpayers does not mean there is discrimination in favor of intrastate commerce and against interstate commerce.[9]

As explained above, one of the purposes of the CAD was to promote investment in Michigan. The CAD encouraged the acquisition of capital assets in Michigan by both local business and interstate business. Encouragement of investment in Michigan by a means which does not discriminate against interstate commerce poses no constitutional problem. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 646; 104 S. Ct. 2620; 81 L. Ed. 2d 540 (1984); *Trinova, supra*, 112 L. Ed. 2d at 912.

The Michigan Court of Appeals explained:

> Although plaintiff contends a discriminatory purpose is indicated by particular legislative commentary at the time of consideration of the 1995 amendments, we do not share plaintiff's interpretation of the referenced dialogue. To the

---

[9] If a deduction or adjustment were unconstitutional because it benefited some multistate taxpayers and not others, then any adjustments would be unconstitutional. For example, the SBT has numerous provisions that affect the tax liability and effective tax rate for both intrastate and interstate businesses. Such provisions include:

(1) the business loss deduction [MCL 208.23b]; (2) the excess compensation deduction [MCL 208.31(4)]; (3) the small business exemption [MCL 208.35]; (4) the gross receipts limitation or adjustment [MCL 208.31(2)]; and (5) the consolidated or combined return provision [MCL 208.77]. All of these provisions affect the SBT liability and effective tax rate of both intrastate and interstate businesses in different degrees. For those taxpayers, both intrastate and interstate, who benefit from such provisions, their effective tax rate is reduced. For others the provisions provide no benefit.

The CAD operates in the same manner. For some multistate taxpayers it provides a greater benefit; for other multistate taxpayers the benefit is not as advantageous. These provisions, however, have never been challenged as unconstitutional.

contrary, we believe that such discussions regarding the goal of encouraging investment in Michigan fall in line with repeatedly approved intent and practice:

> It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State. States are free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." [*Trinova, supra* at 385-386, quoting *Boston Stock Exchange v. State Tax Comm,* 429 U.S. 318, 336; 97 S. Ct. 599; 50 L. Ed. 2d 514 (1977).] 248 Mich. App. 279-280.

B. This Case is Distinguishable from *Westinghouse v. Tully*. That was a Case Involving Facial Discrimination.

Westinghouse v. Tully, supra, has generated some confusion and disagreement as to its portent for state taxation of multistate business. Some authors have concluded that based upon *Westinghouse* this Court, under the aegis of the Commerce Clause, would invalidate investment tax credits and similar credits that are based upon site-specific expenditures.[10]

---

[10] See Hellerstein and Coenen, "Commerce Clause Restraints on State Business Development Incentives," 81 Cornell L Rev 789 (1996); Hellerstein, State Taxation and the Supreme Court, 1983-84 Term; 3 NYU Inst on State and Local Taxation, Ch 13 (1985); Seogo & Schell, Tax Credits and the Commerce Clause After Westinghouse Electric Corporation, 3 J of State Taxation 101 (1984); Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 Harv. L. Rev. 377 (1996).

On the other hand, not only are such state tax incentives abundant, tax literature and articles suggest increasing such incentives.[11]

The answer to this apparent paradox, the proliferation of tax credits for site-specific expenditures in spite of the prohibition of "economic protectionism," is that *Westinghouse* is nothing more than a case of facial discrimination against interstate commerce. In *Trinova,* the Court specifically recognized *Westinghouse* as a case of facial discrimination. The decision distinguished the SBT from the discrimination in *Westinghouse*:

> Trinova also urges that the Michigan SBT should be struck down because it discriminates against out-of-state businesses in violation of the Commerce Clause. Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face, as in the cases it cites. See, e.g., *Westinghouse Electric Corp v. Tully*, 466 U.S. 388, 393; 80 L. Ed. 2d 388; 104 § Ct 1856 (1984) (tax credit was limited to gross receipts from export products shipped from a regular place of business of the taxpayer within New York*); Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 324. [112 L. Ed. 2d at 911.]

This Court has not elevated the Commerce Clause prohibitions of "economic protectionism" to a higher plane. It has not curtailed the power of state legislatures to provide tax incentives for local investments. To the contrary, this Court in

---

[11] See, Pschak, State Economic Development Incentives: What's Available? What works? 8 J of State Taxation 191 (1990); Kenyon, Reassessing Competition Among State and Local Governments, 16 Intergovernmental Perspective 32 (Winter 1990).

Trinova, 12 L. Ed. 2d at 912, approvingly noted that "it is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the taxing state."

Westinghouse was a case of "economic protectionism" in which the tax credit was designed to protect New York exporting businesses. The tax credit protected those businesses already in New York which shipped exports from New York. In the opinion the Court stated:

> The DISC credit, significantly, is limited to gross receipts from export products "shipped from a regular place of business of the taxpayer within [New York]." § 210.13(a)92). 466 U.S. at 393.
>
> ***
>
> When a tax, on its face, is designed to have discriminatory economic effects, the Court "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760; 68 L. Ed. 2d 576; 101 S. Ct. 2114. [466 U.S. 406-407.]

Unlike the New York franchise tax credit, the CAD was not discriminatory on its face. The tax benefit of the CAD was not confined to local business. Instead, the CAD sought to attract new investment in Michigan, both local and interstate. This distinction is critical. Protecting existing local business by reducing its tax burden is not permitted, but attracting new businesses (local and interstate) through investment incentives is permissible.

To repeat, the New York franchise tax credit was a form of economic protectionism; the CAD was an investment incentive. In *Trinova,* the Court, seven years after *Westinghouse*, applauded the ". . . laudatory goal . . . of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state."[12] 112 L. Ed. 2d at 912.

There is a significant distinction between discrimination against interstate commerce which adversely affects interstate commerce and tax schemes which provide incentives by attracting new investment into the state. The former is prohibited, but the latter, as this Court specifically recognized in *Trinova*, is permitted.

Finally, most states that impose a net income tax or franchise tax measured by net income, provide at least one or more credits for various types of investments within the states.[13] At least 16 states allow some form of investment tax credit for making investments within the state. At least 10 states provide a tax credit for investing in research and development activities within the state. At least 30 states grant tax credits for investments into enterprise or economic development zones.

The CAD provided the same or a similar investment incentive that these various state income tax credits provide. Such incentives which promote investment within the state are "laudatory goals" as long as they do not discriminate against interstate commerce. *Allied Stores, supra; Armco, Inc, supra; Trinova, supra.* A taxing scheme cannot be found unconstitutional without considering its full effect. The SBTA

---

[12] While the site-specific CAD was not argued in *Trinova*, the SBT (as in effect for litigated tax years) did contain a site-specific CAD for real property.

[13] See 1 CCH Multistate Corporate Income Tax Guide, ¶ 180, which identifies the tax credits each state offers for investing in that state.

with its site-specific CAD provision did not discriminate against interstate commerce.

C. The Issues Raised By Petitioner Are No Longer Viable.

Even if there ever had been a substantial question of federal law, it no longer exists. Petitioner challenged the constitutionality of the former CAD provision method of calculating. Because the statute was repealed in 1999, that complaint no longer exists. Because of the drastic potential reduction of SBT tax revenues (estimated between $500 million and $700 million) caused by the decision of the Michigan Court of Claims, the Michigan Legislature was forced to repeal the CAD. Finally, the entire tax expires with tax years beginning after December 31, 2009.

CONCLUSION

Although this Court has already observed that "... Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face. . . ." (*Trinova*, 498 U.S. at 384), Petitioner maintains that the unique method which was previously used to apportion the CAD deductions to Michigan business activity violated the Commerce Clause by discriminating against interstate commerce. Petitioner's analysis is erroneous. The former CAD did not discriminate against interstate commerce. Indeed, a proper analysis reveals that the CAD was neutral to multistate business and/or a group of multistate businesses, and to intrastate Michigan businesses.

Petitioner has already achieved part of its goal and the issues which it raises are moot. The Michigan Legislature has already repealed the CAD.

The Michigan Court of Appeals' opinion is consistent with decisions of this Court which apply the Commerce Clause limitations to state taxation. For these reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Russell E. Prins
Glenn R. White
Assistant Attorneys General

Attorneys for Respondent

April, 2003